

Judicial Review of Decisions of the Ohio Industrial Commission

BY HAROLD ADAMS*

INTRODUCTION

This article deals with judicial review of decisions of the Industrial Commission of Ohio, allowing and denying workmen's compensation. In the beginning there is a general discussion of the right of appeal provided by the Workmen's Compensation Law. Later, there is a detailed discussion of the grounds for appeal and the steps in perfecting the appeal, together with the procedure on the rehearing before the Industrial Commission and the procedure in the common pleas court. This is followed by a discussion of evidence on the appeal in workmen compensation cases, including hearsay evidence, opinion evidence, judicial notice, and circumstantial evidence. The article also compares the judicial review provided by the Workmen's Compensation Law of Ohio with the judicial review provided in the Ohio Administrative Procedure Act and with the judicial review in workmen's compensation cases in other states. The historical background of judicial review in Ohio workmen's compensation cases and the legislative changes since the original act was enacted are briefly set forth. Statistics on the number of claims filed, together with the number of claims appealed, are given. The article ends with a discussion of judicial review by means of an action in mandamus and the employer's right to judicial review in workmen's compensation cases.

IN GENERAL

Section 1465-90 of the General Code provides for an appeal on questions of law and fact to the common pleas court from certain decisions of the Industrial Commission of Ohio denying workmen's compensation. The appeal lies only when the decision denies compensation on one of the eight grounds specifically named in Section 1465-90.¹

No appeal is provided from a decision which allows some compensation, and the claimant only has the right of appeal in such cases.

*Former Chairman of Ohio State Bar Association's Industrial Commission Committee.

¹ Discussed *infra* in text between notes 13 and 14.

This right of appeal on behalf of the claimant lies only in accidental injury cases. The claimant has no right of appeal in an occupational disease case nor in an additional award case wherein additional compensation is sought for violation of a specific requirement for safety by the employer. Section 3496-13 provides for an appeal on questions of law only to the common pleas court from a decision of the Industrial Commission denying compensation to the claimant in public work relief cases, the decision of the Industrial Commission being final on all questions of fact. The employer has no right of appeal in any case.

In the appeal under Section 1465-90 there is a trial on both questions of fact and law in the common pleas court of the county where the accidental injury occurred upon a transcript of the evidence taken upon a rehearing before the Industrial Commission of Ohio. In such a trial the parties are entitled to a jury. No evidence may be offered at the trial except such as is contained in the transcript of evidence made on rehearing before the Industrial Commission of Ohio. The attorneys for the parties read the evidence to the jury or court, if, by agreement of the parties, a jury is not used. The jury or the court is limited to a finding as to the right of the claimant to receive compensation under the Workmen's Compensation Law. If the finding is in favor of the claimant the case goes back to the Industrial Commission to fix the period of disability and the amount of compensation. The filing of an application for rehearing with the Industrial Commission within 30 days after the notice of denial and the presenting of the evidence in accord with the rules of evidence before the Industrial Commission referee on rehearing are conditions precedent to the filing of the appeal in court.²

² Marsh v. Commission, 121 Ohio St. 494, 169 N.E. 569 (1929).

COMPARISON WITH ADMINISTRATIVE PROCEDURE ACT.

The judicial review of decisions of the Industrial Commission differs from that provided in the Administrative Procedure Act. Section 154-73 of the Administrative Procedure Act provides that any party adversely affected by an order of an agency denying admission to examination or denying the issuance or renewal of a license or revoking or suspending a license may appeal to the common pleas court of the county in which the place of the business of the licensee is located or the county in which the licensee is a resident, provided that appeals from the decisions of the Board of Liquor Control shall be to the Court of Common Pleas of Franklin county, Ohio only. *Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the Common Pleas Court of Franklin*

county. In the hearing of the appeal the court is confined to the record as certified to it by the agency provided, however, that the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency. The finding of the agency on questions of fact is final; the court may not substitute its judgment for that of the agency on questions of fact.³

In the *Farrand* case;⁴ the court of appeals held that Section 154-73 of the General Code provides for an appeal on questions of law and fact; that the court may substitute its judgment for that of the agency on questions of fact. But the supreme court reversed the court of appeals. After the decision of the supreme court in the *Farrand* case, Section 154-73 was amended, effective August 28, 1951, to provide that the court may affirm the order of the agency if it finds from all the evidence before the court that the order is supported by reliable, probative and substantial evidence, and is in accordance with law. In the absence of such a finding by the court it may reverse, vacate, or modify the order.

In an appeal on questions of law only, a finding of a tribunal on questions of fact is not absolutely final, in that it may be reversed by a reviewing court when the reviewing court finds there is no competent evidence to support the findings or that the finding is against the manifest weight of the evidence.⁵

The power of the reviewing court to reverse on the ground that the judgment is against the manifest weight of the evidence is very limited. In order to reverse the reviewing court must be satisfied from the whole record that the lower tribunal misapprehended the facts or was influenced by sympathy, bias, prejudice, willful disregard of duty, or other improper motive, resulting in error and injustice, shocking to the senses and to the conscience of the court.⁶

³ *Farrand v. State Medical Board*, 151 Ohio St. 222, 85 N.E. 2d 113 (1949).

⁴ Note 3, *supra*.

⁵ *Schendel v. Bradford*, 106 Ohio St. 387, 140 N.E. 155 (1922); *Toledo Railways & Light Co. v. Mason*, 81 Ohio St. 463, 91 N.E. 292 (1910); *Cornfeldt v. Rihacek*, 39 Ohio App. 292, 177 N.E. 522, 8 Ohio L. Abs. 676 (1930); see 2 O. JUR. 1143.

⁶ *Industrial Commission v. Ochenduska*, 30 Ohio App. 442, 164 N.E. 797 (1928); *Klein v. Stewart*, 25 Ohio App. 393, 158 N.E. 238 (1927); *Burton Coal Co. v. Gorman Co.*, 22 Ohio App. 383, 158 N.E. 863 (1926); see 2 O. JUR. 1158.

As a general rule, a judgment will not be reversed on the weight of the evidence if it is supported by any competent, credible evidence. *Denison Coal & Supply Co. v. Bartelheim*, 122 Ohio St. 374, 171 N.E. 835 (1930); *Commission v. Pora*, 100 Ohio St. 218, 125 N.E. 662 (1919); see 2 O. JUR. 1161.

The rule applies even though there is strong evidence against the finding, *Slamey v. City Material Co.*, 30 Ohio App. 435, 165 N.E. 55 (1928); even though the evidence supporting the finding does not impress the reviewing court, *Union Bus Station, Inc. v. Etosh*, 48 Ohio App. 161, 192 N.E. 818 (1933); *Ungerleider v. Ewers*, 20 Ohio App. 79, 153 N.E. 191 (1925); or even though the reviewing court differs in

The supreme court has not yet passed on the question as to whether the 1951 amendment of Section 154-73 enlarges the scope of the review of the decision of an administrative agency by the court. The purpose of the amendment was to enlarge the scope of review beyond that announced by the supreme court in the *Farrand* case. It would appear that the review remains one on questions of law only but that the reviewing court is not bound by the usual rules in reversing on the weight of the evidence. At least the court would not have to be shocked by the finding of the agency in order to reverse on the weight of the evidence.

The Administrative Procedure Act does not apply to the Industrial Commission of Ohio.⁷ This was on the recommendation of the Administrative Law Commission which prepared the Administrative Procedure Bill for the legislature. Thus, there are two fundamental differences between the right of appeal from decisions of the Industrial Commission and the right of appeal under the Administrative Procedure Act: In appeals from the Industrial Commission there is a right to a trial on questions of fact to a jury, and the appeal from the Industrial Commission lies in the county where the accidental injury occurred.

HISTORICAL BACKGROUND

One purpose of the Administrative Procedure Act of Ohio is to provide uniform procedure before and in appeals from administrative agencies in Ohio. A look at the history of the Workmen's Compensation Law in Ohio will explain why the Industrial Commission was excluded from the Act. Since the enactment of the original Workmen's Compensation Law the representatives of organized labor and the employer groups meet each two years prior to the legislative session and work out a so-called agreed bill on amendments to the Workmen's Compensation Law. This agreed bill has always been enacted into law by the legislature. An amendment proposed by any other source and not included in the agreed bill is opposed in the legislature by the representatives of labor and employers and has no chance of being enacted into law. It appears that the Ohio legislature has adopted the policy of enacting into law only amendments contained in the agreed bill.

its opinion as to the facts, *Victor Tea Co. v. Walsh*, 38 Ohio App. 516, 176 N.E. 585 (1931); *Burton Coal Co. v. Gorman Coal Co.*, *supra*, note 5; see 2 O. JUR. 1155.

⁷ Section 154-62 of the Administrative Procedure Act contains the following provision—"This act shall not apply to actions of the Industrial Commission under the provisions of Sections 1465-37 to 1465-112, both inclusive, of the General Code, anything in this act to the contrary notwithstanding."

The writer, when chairman of the Industrial Commission Committee of the Ohio State Bar Association, has had the experience of appearing before the committees of the legislature in support of bills sponsored by the Ohio State Bar Association proposing amendments to the Workmen's Compensation Law. The bills were always opposed by representatives of labor and employers with the argument that changes in the Workmen's Compensation Law had always been by a bill agreed upon by representatives of labor and employers, who had also agreed to oppose any bill proposed by any other group. The bills proposed by the bar association were always killed in committee. It appears that the agreed bill is arrived at by a "horse trading" process between organized labor representatives and employer representatives.

In Ohio we find organized labor very jealous of its right to trial by jury. The Workmen's Compensation Law takes away the right of the injured workman to sue his employer in a civil action for damages, wherein he would have the right of trial by jury. At the same time, the Workmen's Compensation Law preserves the right to trial by jury to the injured workman in the appeal to court from the Industrial Commission as provided in Section 1465-90.⁸

GRADUAL LIMITATION ON RIGHT OF APPEAL

Over the years there has been a gradual limitation imposed on the right of appeal in Workmen's Compensation Cases in Ohio. Originally an appeal could be taken from an order denying compensation on any ground going to the basis of claimants right. In 1937, the appeal was limited to the eight specific grounds now provided in Section 1465-90. Until 1925 the appeal was direct to the common pleas court and the evidence was not limited to that in the record of the commission. Until 1925 the jury fixed the period of disability and the amount of compensation within the limits of the Workmen's Compensation Law. In 1925 Section 1465-90 was amended to provide that as a condition precedent to filing the appeal in court, the claimant must file an application for rehearing with the commission within 30

⁸ Ohio is one of the few states which provides an appeal on questions of fact with a jury in workman's compensation cases. Schneider's *Workman's Compensation* (Cum. Supp. 1953) and *Martindale's Law Digest* (1952) show the following with respect to appeal in workman's compensation cases in the various states:

Appeals on Law and Fact with Jury—Ohio, Maryland, Oregon, Washington, Vermont.

Appeals on Law and Fact to the Court—Illinois, Kansas, Mississippi, Montana, New Jersey, Rhode Island, Texas.

Appeals on Law only—the remainder of the states except Alabama, which provides an appeal on law only except that a jury may be demanded to try the issue of fact as to willful misconduct.

days after notice of the denial; on such rehearing before the referee of the commission the parties must present the evidence to be used on the appeal in court, and only after the evidence has been presented and the claim denied again by the commission may the claimant file his appeal in court. In the appeal to the court, the evidence is limited to that contained in the rehearing record. Such evidence is governed by the usual rules of evidence, whereas on the original hearing of the claim, the commission is not bound by the usual rules of evidence.⁹

The Industrial Commission has sometimes made ambiguous orders denying compensation which in effect defeated any right of appeal. Then, when the claimant filed with the Industrial Commission his application for rehearing, which was a condition precedent to an appeal under Section 1465-90, the Industrial Commission dismissed the application for rehearing, construing the order as a non-appealable order.

The claimant was required to file a mandamus suit in the supreme court for an order requiring the Industrial Commission to grant the rehearing, so that the claimant could present his evidence on rehearing before the Industrial Commission referee. In 1937 Section 1465-90 was amended for the purpose of putting an end to such ambiguous orders. The Section now provides that if the order does not state the ground on which the claim was denied or if the order is not definite in such regards, and if the Industrial Commission refuses to correct such order, the claimant may maintain an action in mandamus against the commission in the supreme court, and if the court orders the commission to state the grounds of its order or make the order definite, there shall be taxed as part of the costs assessed against the commission an attorney fee in the amount of \$250.00.

FEW CLAIMS APPEALED

The 1945 Report of the Administrative Law Commission of

⁹ OHIO GEN. CODE 1465-91. In 1921 Section 1465-90 was amended to provide that the evidence on the appeal was limited to that contained in the commission record, but the provision was held invalid as being inconsistent with the provision in the same section that claimant shall be entitled to a trial in the ordinary way. *Commission v. Hilshorst*, 117 Ohio St. 337, 158 N.E. 748 (1927). The 1925 amendment, which limits the evidence on appeal to that contained in the rehearing record, deleted from Section 1465-90 the provision that the claimant was entitled to a trial in the ordinary way, and it has been held valid by the supreme court. *Grabler Manufacturing Co. v. Wrobel*, 125 Ohio St. 265, 181 N.E. 97 (1932); *State ex rel. Kauffman v. Commission*, 121 Ohio St. 472, 169 N.E. 572 (1929). The 1925 amendment further provides that the jury find whether or not the claimant is entitled to participate in the Workman's Compensation Fund. If the finding is for the claimant the case goes back to the commission to determine the period of disability and the amount of compensation.

Ohio,¹⁰ shows that during the ten year period from 1934 through November 1, 1943, 15,412 applications for rehearing after denial of the claim by the commission were filed and 4,720 actions on appeal from decisions of the Industrial Commission were filed in the courts of common pleas. Thus, there was an average of around 1500 applications for rehearing and an average of 470 appeals to court filed each year. In the year 1942, 320,000 claims were filed with the Industrial Commission of Ohio, 264,000 of which were for payment of medical expense only, 55,000 of which were for payment of compensation in addition to medical expense, and 1,000 of which were for compensation for death. The Administrative Law Commission further reported that 90% to 95% of the claims filed were disposed of by the claims examiners, without a formal hearing, by ordering them paid.

In 1951, 324,458 new claims were filed with the commission. In 1951, 1963 applications for rehearing were filed with the commission. In 1951 the commission dismissed 818 applications for rehearing, allowed the claim on rehearing in 650 cases and denied the claim on rehearing in 600 cases. In the same year, 371 appeals were filed in court.

In 1935 the report of the special subcommittee on workmen's compensation, acting under Senate Resolution 69,¹¹ shows the following with respect to appeals from the Industrial Commission in the 1930's:

Appeals filed in court

In 1930 — 141

In 1931 — 225

In 1932 — 275

In 1933 — 504

In 1934 — 520

Of this total of 1666 cases, 685 were won by the Industrial Commission, 719 were won by the claimant and 262 were settled.

The committee further reported that around 150,000 new claims were filed each year with the Industrial Commission and that approximately 85% to 90% of these were disposed of by the claims examiners by ordering them paid.¹²

At the time of its report, the subcommittee found that there were about 4000 claims pending on rehearing in which no testimony had been taken, and that in the larger cities a year and a half to 2 years elapsed between the time the application for rehearing was filed and the time it was disposed of by the commission.¹³

Additional help has been provided in the rehearing section. As

¹⁰ REPORT OF ADMINISTRATIVE LAW COMMISSION OF OHIO (1945), p. 33.

¹¹ *Ibid.* pp. 31, 32.

¹² *Ibid.* p. 21.

¹³ *Ibid.* p. 33.

a result, there is less delay in the hearing of claims on rehearing than existed in the 1930's. In the writer's experience, however, six to nine months elapse between the time the application for rehearing is filed and the time it is finally disposed of by the Industrial Commission. After the appeal is filed in the common pleas court, it is usually disposed of within three to six months. An additional six to nine months is required if there is an appeal to the court of appeals and the supreme court.

In the writer's experience, most of the appeals turn on questions of fact, and, due to the difference of opinion between doctors, often on the question of the relationship between the injury and disability or death.

GROUND'S FOR APPEAL

Section 1465-90 of the General Code provides a right of appeal to the claimant if the commission denies the right of the claimant to receive compensation on any of the following grounds: ". . . that the injury was self-inflicted; that the injured person was not an employee; that the injury did not occur in the course of or arise out of the employment; that the claimant's disability is not the result of the injury; that the claimant, having received compensation for the period of temporary total disability and having received the maximum amount of compensation for temporary partial disability as provided in this act, and having engaged in no gainful occupation for the period of four years prior to the decision of the commission, during which time compensation has been payable to such claimant, is not permanently and totally disabled as a result of the injury; that the death did not result from the injury; that the claimant was not legally or actually dependent upon the decedent; or that the employer was not amenable to the law." In all other cases the action of the commission is final. Section 1465-90 gives the right of appeal to the injured employee and his dependents in an accidental injury claim; this right of appeal exists only in those in whom the statute confers such right.¹⁴ No appeal lies from a denial of an award for occupational disease,¹⁵ and no appeal lies in an additional case for violation of a specific requirement.¹⁶ The employer has no right of appeal under Section 1465-90, and Section 871-38 does not authorize an employer to invoke the jurisdiction of the supreme court to review an award made by the commission.¹⁷

¹⁴ Snyder v. State Liability Board of Awards, 94 Ohio St. 342, 144 N. E. 268 (1916).

¹⁵ Commission v. Monroe, 111 Ohio St. 812, 146 N.E. 213 (1924).

¹⁶ Berry v. Commission, 129 Ohio St. 228, 194 N.E. 414 (1935).

¹⁷ Pittsburgh Coal Co. v. Commission, 108 Ohio St. 185, 140 N.E. 684 (1923).

STEPS IN PERFECTING AN APPEAL

1. *The Rehearing*

The first step in the appeal procedure is the filing of an application for rehearing by the claimant within thirty days after notice to the claimant of the denial by the commission. The claimant loses his right of appeal unless the application for rehearing is filed within said time. The commission has a form called "Application for Rehearing" which may be obtained from the commission, filled out and signed by the claimant, and filed. The application for rehearing may be signed by an attorney as attorney for the claimant.¹⁸ It is advisable however to have the claimant sign the application unless the thirty days are about to expire and there is not time to obtain claimant's signature on the application. It is not necessary that the form of application for rehearing furnished by the commission be used. A letter may be used, but the letter must request a hearing. A letter merely complaining of the denial by the commission is not an application for rehearing and will not preserve the claimant's right of appeal.¹⁹ To avoid trouble it is advisable to use the commission's form of application for rehearing. Where the application does not request a rehearing or is not filed within thirty days after notice of denial, or where the commission considers that the order of denial is not an appealable order, the commission will dismiss the application for rehearing.²⁰ In the absence of an abuse of discretion the decision of the Industrial Commission as to whether an application for rehearing has been filed within the thirty day period is final.²¹

Upon the granting of the application for rehearing by the commission the former action of the commission is vacated. The claim is then assigned for rehearing, usually in the county where the accident occurred, before a referee of the Industrial Commission, at which hearing the claimant and his counsel and an Assistant Attorney General on behalf of the Industrial Commission and the employer and his counsel may appear. In State Fund cases the Assistant Attorney General usually conducts the examination of the defense witnesses and cross-examination of claimant's witnesses, but Section 1465-90 provides

¹⁸ *State ex rel. Jurgens v. Commission*, 127 Ohio St. 524, 189 N. E. 445 (1933).

¹⁹ *State ex rel. Smith v. Commission*, 140 Ohio St. 117, 42 N.E. 2d 650 (1942).

²⁰ Where the thirty days for filing expires on a Sunday, the application may be filed on the following Monday by virtue of Section 10216. *State ex rel. Yantze v. Commission*, 125 Ohio St. 447, 181 N.E. 874 (1932). Where the commission's office was closed on the thirtieth day because of a holiday (Decoration Day), the application filed on the first business day thereafter is within time. *State ex rel. Ramsey v. Commission*, 141 Ohio St. 398, 48 N.E. 2d 232 (1943).

²¹ *State ex rel. Allen v. Commission*, 127 Ohio St. 541, 189 N.E. 503 (1934); *State ex rel. Smith v. Commission*, *supra*, note 19.

that counsel for the employer shall have the right to present evidence, examine or cross-examine witnesses, and participate fully in the rehearing. The Industrial Commission furnishes the reporter to take the evidence and the claimant proceeds to present his witnesses who are examined and cross-examined. The rules of evidence applied in the trial of civil cases governs on the rehearing.²² The procedure is similar to that upon the taking of a deposition except that the referee passes upon the objections or motions at the time they are made. Section 1465-90 states that if an objection is sustained, the party offering the same shall state the nature of such evidence and the matter such party proposes to prove, and such statements shall be made a part of the record of such rehearing. As a matter of practice the referee, upon sustaining an objection to a question, does not permit counsel to make a statement into the record as to the answer but will ask the witness to answer the question and the answer will be considered as a proffer of the evidence.

The claimant offers all his evidence at the first hearing. If claimant has witnesses at another place, however, upon his request he will be granted a continuance for the purpose of offering such further evidence. It is often necessary for the claimant to ask for the second hearing in order to obtain medical evidence. Under the rules of the commission each side is limited to two hearings. After the claimant's evidence is completed the matter is then continued to a later date for the purpose of taking evidence on behalf of the Industrial Commission and the employer. After the evidence on both sides has been completed and the reporter has transcribed the evidence and the referee has prepared his report upon the same, the claim is again assigned for hearing before the commission. Under this procedure if each side requires two hearings, making a total of five hearings including the final hearing on rehearing by the commission, considerable delay in the final decision cannot be avoided.

2. *The Proceedings in the Common Pleas Court*

If the commission again denies the claim upon the rehearing on any of the eight grounds above specified, the claimant, within sixty days after receipt of notice of such denial, may file a petition on appeal in the common pleas court of the county wherein the injury was inflicted or in the common pleas court of the county wherein the contract of employment was made in cases where the injury occurs outside of the State of Ohio.²³ If the employer paid premiums into the State Insurance Fund covering its employees the Industrial Commission shall be the defendant in such action and summons shall

²² *Rinehart v. Commission*, 137 Ohio St. 159, 28 N.E. 2d 498 (1940).

²³ OHIO GEN. CODE § 1465-90.

be issued to the Industrial Commission and also to the Attorney General. As a matter of practice and to save costs the Attorney General will sign a waiver of the issuance and service of summons on behalf of the Industrial Commission, if asked to do so by the plaintiff. If the employer is a self-insurer or is a non-complying employer, the defendant in such action shall be such employer and summons shall issue to such employer. Further pleadings shall be had in accordance with the rules of civil procedure. Within ten days after filing the answer the Industrial Commission shall certify to the court a transcript of the rehearing record, and the court or a jury, under the instructions of the court if a jury is demanded, shall determine the right of the claimant to receive compensation from the State Insurance Fund or from the employer in self-insuring and non-complying employer cases, upon the evidence contained in such rehearing record and no other evidence.²⁴ The objections and motions are limited to those contained in the rehearing record.²⁵ The court may exclude from the evidence such portions of the transcript as are not competent, material, or relevant evidence and to which objection was made at such rehearing and may admit in evidence such competent, material, or relevant evidence as was excluded by the commission at such rehearing, over the objection of the party offering the same.

EVIDENCE ON APPEAL

The burden of proof is on the claimant to prove by a preponderance of the evidence that the injured employee sustained an accidental injury in the course of and arising out of his employment and that said injury was the proximate cause of the disability or death. In death cases claimant must prove dependency on the injured employee. If death results more than two years after the injury, claimant must also prove that the injured employee suffered continuous disability from the date of injury to date of death. Such disability need not be total but any disability from the injury is sufficient.²⁶ In State Fund cases the claimant must also prove that his employer had complied with the Workmen's Compensation Law by paying premiums into the State Insurance Fund. In non-complying employer cases the claimant must prove that such employer was amenable to the Workmen's Compensation Law and that the employer has failed to comply with the Workmen's Compensation Act. In self-insuring employer cases claimant must prove that the employer had qualified as and was operating as a self-insurer. Usually the compliance with the Workmen's Com-

²⁴ Grabler Manufacturing Co. v. Wrobel, *supra*, note 9.

²⁵ Jeffrey Co. v. Yates, 13 Ohio L. Abs. 340 (1933).

²⁶ Cleveland Provision Co. v. Hunter, 35 Ohio App. 169, 172 N.E. 294 (1929).

pensation Law by the employer can be stipulated by the parties and some of the other elements of claimant's case may be stipulated by the parties. In a death case claimant must offer competent evidence of an accidental injury to the deceased employee arising out of and in the course of his employment, even though the commission in the decedent's lifetime had allowed decedent's claim and paid compensation to the decedent in his lifetime for the same injury.²⁷ In the following discussion the writer describes the various rulings on evidence offered at the rehearing. In the writer's experience the problems of hearsay, opinion, and circumstantial evidence, in addition to the problem of judicial notice, are of major significance in workman's compensation litigation. No attempt has been made to analyze or criticize the rulings of the Ohio courts on these questions of evidence; rather, merely a brief review of the more important cases has been made so that the reader may draw his own analogies and broad conclusions.

HEARSAY EVIDENCE ON APPEAL

Hearsay evidence is not admissible on the rehearing unless brought within an exception to the hearsay rule.²⁸ A statement of a deceased as to where he was going at the time of departure is competent evidence as a part of the *res gestae* in explanation of the act of leaving.²⁹ In the case of *Stough v. Commission*,³⁰ where the evidence showed that equipment was leaking gas, a statement by the decedent when he left his place of work that he had a headache, with evidence that other employees had headaches, was held admissible as a part of the *res gestae* and sufficient to take the case to a jury as evidence of an accidental injury from inhalation of fumes.

The affidavit of the decedent made to an investigator of the Industrial Commission and contained in the file of the decedent during decedent's lifetime is not admissible on the rehearing in a death claim by a dependent of decedent,³¹ but the transcript of the decedent's testimony as to an injury made on rehearing in decedent's claim while alive is admissible on the rehearing in a death claim by his dependents.³² Similarly, the transcript of the testimony of a witness at an oral hearing before the Industrial Commission is admissible on rehearing where the witness has since died.³³

²⁷ *Commission v. Davis*, 126 Ohio St. 593, 186 N.E. 505 (1933).

²⁸ *Weaver v. Commission*, 125 Ohio St. 465, 181 N.E. 894 (1932).

²⁹ *Outland v. Commission*, 136 Ohio St. 488, 26 N.E. 2d 760 (1940).

³⁰ 148 Ohio St. 415, 75 N.E. 2d 441 (1947).

³¹ *Rinehart v. Commission*, *supra*, note 22.

³² *Commission v. Bartholome*, 128 Ohio St. 13, 190 N.E. 193 (1934).

³³ *Commission v. Glick*, 49 Ohio App. 415, 197 N.E. 372 (1934).

Where the cause of death is in issue, declarations of a decedent made to a physician or others narrating the cause which is claimed to have contributed to the death are self-serving and inadmissible unless a part of the *res gestae*, but a physician who treats a patient can testify as to statements made by the patient relating to his condition and symptoms.³⁴

The report of the employer which is part of the application form for the claimant furnished by the commission, to be filled out and signed by the claimant and the employer, is admissible evidence in a death case, but the employer's certificate thereon attesting to the truth of the statements of the applicant as to the cause of injury has no evidentiary value if it is proven that such certificate was based solely upon self-serving statements contained in the application. The jury will be instructed to ignore the certificate if such situation develops.³⁵

Under Sections 1261-66 and 2855-11 of the General Code a death certificate and a coroner's report are admissible in evidence as to the facts contained therein but opinions or conclusions therein do not constitute facts and are not admissible. For example a statement in a death certificate or coroner's report that the decedent committed suicide where there was no eye witness is an opinion and is not admissible.³⁶ A general objection to a death certificate is too broad and will be overruled if there are competent and incompetent statements in the certificate. The objection must be directed specifically to the incompetent statement in order to be sustained.³⁷

OPINION EVIDENCE ON APPEAL

A doctor may give his opinion on an ultimate fact for the decision of the jury where the subject is not one of common knowledge. Where the ultimate fact for a jury depends upon the interpretation of certain scientific facts beyond the experience, knowledge or comprehension of the jury a doctor may express his opinion on such ultimate fact which the jury is to determine.³⁸ A doctor's opinion as to the cause of death is admissible where the doctor attended the deceased or ex-

³⁴ *Coutellier v. Commission*, 126 Ohio St. 546, 186 N.E. 400 (1933); *Dugan v. Commissioner*, 135 Ohio St. 652, 22 N.E. 2d 132 (1939).

³⁵ *Coutellier v. Commission*, *supra*, note 34; *Commission v. Christophel*, 34 Ohio L. Abs. 65, 34 N.E. 2d 458 (1941); *Commission v. Barthelome*, *supra*, note 32; *Dean v. Commission*, 52 Ohio L. Abs. 562, 81 N.E. 2d 813 (1948).

³⁶ *Carson v. Insurance Co.*, 156 Ohio St. 104, 100 N.E. 2d 197 (1951). In the case of *Stough v. Commission*, 142 Ohio St. 446, 52 N.E. 2d 992 (1944), in construing a statute providing that the death certificate was *prima facie* evidence of the facts therein stated, the court held that facts therein stated which were based on hearsay were not admissible.

³⁷ *Wherle v. General Motors*, 51 Ohio L. Abs. 220, 80 N.E. 2d 702 (1948).

³⁸ *Hall v. Nagel*, 139 Ohio St. 265, 39 N.E. 2d 612 (1942).

amind his body after death.³⁹ A doctor is not permitted to give his opinion as to whether a bullet wound was self-inflicted, because this would invade the province of the jury.⁴⁰ Medical books are not admissible in evidence to prove the truth of statements therein,⁴¹ but a medical book may be used to cross-examine.⁴²

In connection with expert medical opinion the question of privilege frequently arises. For instance, a doctor cannot testify as to what he observed as to a patient on objection by the widow of the patient for the reason that the same is a privileged communication.⁴³ A privileged communication may be made by exhibiting the body or by verbalizations. A doctor cannot testify with respect thereto unless there is an express consent or waiver by the patient. If the patient testifies as to the condition there is a waiver in respect to that condition.⁴⁴ Testimony by the patient that before the accident his general physical condition was good does not constitute a waiver of the privilege.⁴⁵ The privileged communication rule does not apply to the relationship of nurse and patient, therefore a nurse may testify as to communications made to her by a patient.⁴⁶ A widow may waive the statutory physician-patient privilege in an action for compensation for the death of her husband;⁴⁷ however, a waiver of privilege cannot be required by the Industrial Commission as a condition precedent to its consideration of claimant's application for compensation.⁴⁸

Hospital records in the absence of privilege are admissible in evidence insofar as there is compliance with the requirements imposed by Section 12102-23 of the General Code and insofar as such records contain observable facts, transactions, occurrences, or events incident to the treatment of the patient.⁴⁹ Statements in the hospital record based on hearsay and not a part of the *res gestae* are not admissible in evidence under Section 12102-23.⁵⁰

A doctor's opinion that the injury *could* cause the disability or death is generally not sufficient in itself to avoid a directed verdict. An opinion that there was *probably* a relationship between the injury and disability or death would be sufficient. The jury must deter-

³⁹ *Shepherd v. Insurance Co.*, 152 Ohio St. 6, 87 N.E. 2d 156 (1949).

⁴⁰ *Mitchell v. Commission*, 135 Ohio St. 110, 19 N.E. 2d 769 (1939).

⁴¹ *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E. 2d 690 (1950).

⁴² *Bluebird Baking Co. v. McCarthy*, 19 Ohio L. Abs. 466, 36 N.E. 2d 810 (1935).

⁴³ *Commission v. Belay*, 127 Ohio St. 584, 190 N.E. 2d 456 (1934).

⁴⁴ *Baker v. Commission*, 135 Ohio St. 491, 21 N.E. 2d 593 (1939).

⁴⁵ *Harpman v. Devine*, 133 Ohio St. 1, 10 N.E. 2d 776 (1937).

⁴⁶ *Weis v. Weis*, 147 Ohio St. 416, 72 N.E. 2d 245 (1947).

⁴⁷ *Commission v. Waruke*, 131 Ohio St. 140, 2 N.E. 2d 248 (1936).

⁴⁸ *State ex rel. Galloway v. Commission*, 134 Ohio St. 496, 17 N.E. 2d 918 (1938).

⁴⁹ *Weis v. Weis*, note 46, *supra*.

⁵⁰ *Schmitt v. Doehler Die Casting Co.*, 143 Ohio St. 421, 55 N.E. 2d 644 (1944).

mine the probabilities and cannot speculate as to possibilities.⁵¹ In the case of *Drew v. Commission*,⁵² however, it was held that medical evidence that the injury could cause the death *plus* the lay evidence in the record was sufficient to take the case to the jury. In the case of *Peer v. Commission*,⁵³ the court held that it was error to direct a verdict where the jury may deduce a causal connection from the evidence. In the case of *Bowling v. Commission*,⁵⁴ the court held that medical evidence of a causal connection was not necessary to entitle the claimant to receive compensation where the claimant testified that he had a loss of vision after very hot liquid splashed in his eye and that before the injury he had no loss of vision in the eye. But in the case of *Stacey v. Carnegie Co.*,⁵⁵ the court held that medical evidence connecting the disability with the injury was necessary for an award of compensation where the claimant was suffering with bi-lateral cataracts which he claimed to be caused by a small particle about the size of a pin head blowing in his eye.

JUDICIAL NOTICE AND CIRCUMSTANTIAL EVIDENCE

The court may take judicial notice of the rules and regulations adopted and published by the Industrial Commission;⁵⁶ the courts will take judicial notice of a scientific fact which may be ascertained by reference to standard dictionary.⁵⁷

CIRCUMSTANTIAL EVIDENCE

It has been the writer's experience that the commission often denies a death case, where there is no testimony available of an eye witness. The commission, as a general rule, does not allow such claim when based on hearsay evidence only, although Section 1465-91 provides that the commission is not bound by the usual rules of evidence. Cases may be won on appeal in court on circumstantial evidence alone.⁵⁸

⁵¹ *Stacey v. The Carnegie-Illinois Steel Corp.*, 156 Ohio St. 205, 101 N.E. 2d 897 (1951); *Brandt v. Mansfield Rapid Transit, Inc.*, 153 Ohio St. 429, 92 N.E. 2d 1 (1950); *Aiken v. Commission*, 143 Ohio St. 113, 52 N.E. 2d 1018 (1944); *Drakulich v. Commission*, 137 Ohio St. 82, 27 N.E. 2d 932 (1940).

⁵² 136 Ohio St. 499, 26 N.E. 2d 793 (1940).

⁵³ 134 Ohio St. 61, 15 N.E. 2d 722 (1938).

⁵⁴ 145 Ohio St. 23, 60 N.E. 2d 479 (1945).

⁵⁵ 156 Ohio St. 205, 101 N.E. 2d 897 (1951).

⁵⁶ *Commission v. Collela*, 17 Ohio App. 301, 21 Ohio L. Rep. 77 (1923).

⁵⁷ *Commission v. Carden*, 129 Ohio St. 344, 195 N.E. 551 (1935).

⁵⁸ *Commission v. Tripansky*, 119 Ohio St. 599, 165 N.E. 297 (1929); *Shepherd v. Commission*, 152 Ohio St. 6, 87 N.E. 2d 156 (1949); *Commission v. Borset*, 20 Ohio L.

MANDAMUS

In addition to the appeal provided by Section 1465-90, the claimant may have a judicial review of a decision of the Industrial Commission in an action in mandamus. Mandamus is an extraordinary legal remedy granted only in those cases where relief cannot be otherwise obtained. Before the writ may issue, the relator's right thereto must be clear. The writ will not issue in a doubtful case or where its effect would be to control the discretion of the commission.⁵⁹ In such an action the claimant, in order to succeed, must show that the finding of the commission amounted to an abuse of discretion or that the commission failed to perform a clear statutory duty.

Upon application for such writ, the questions which usually arise are: (1) Is there a duty imposed upon the respondent? (2) Is the duty ministerial in its character? (3) Has the petitioner a legal right to the enjoyment, protection, or redress to which the discharge of such duty is necessary? (4) Has he no other sufficient remedy? And, (5), in view of the fact that the issuance of the writ is not always a matter of right, are the circumstances of the case such as will call forth the action of the court?⁶⁰ For example, in the case of *State ex rel. Kildow v. Commission*,⁶¹ the court issued the writ in favor of the claimant, ordering the commission to fix the wage of the claimant in accord with the statute and not the rule of the commission. The court held the rule of the commission inconsistent with the statute and therefore invalid. In the case of *State ex rel. Juergens v. Commission*,⁶² the court issued the writ ordering the commission to grant the claimant a re-hearing where the commission had dismissed the application for re-hearing for the reason that it was signed by the attorney for the claimant instead of by the claimant herself.

EMPLOYER'S RIGHT TO JUDICIAL REVIEW

The employer has no right of appeal under Section 1465-90. Section 871-38 gives the employer no right of appeal to the supreme court from an order of the commission allowing compensation.⁶³ But the

Abs. 584 (1935); *Ryan v. Commission*, 47 Ohio L. Abs. 561, 72 N.E. 2d 907 (1947); *Stalek v. Commission*, 26 Ohio L. Abs. 305 (1938); *Cook v. Commission*, 32 Ohio N.P. (N.S.) 83 (1934).

⁵⁹ *State ex rel. Gerspacher v. Commission*, 157 Ohio St. 32, 104 N.E. 2d 1 (1952); *State ex rel. Stuber v. Commission*, 127 Ohio St. 325, 188 N.E. 526 (1933).

⁶⁰ 25 O. JUR. 989, 990.

⁶¹ 128 Ohio St. 573, 192 N.E. 873 (1934).

⁶² 127 Ohio St. 524, 189 N.E. 445 (1934).

⁶³ *Copperweld Co. v. Commission*, 142 Ohio St. 439, 52 N.E. 2d 735 (1944); *Cincinnati Co. v. Commission*, 148 Ohio St. 146, 73 N.E. 2d 876 (1947).

employer may have a judicial review of a decision of the Industrial Commission in an action in mandamus or prohibition. In the *Willys-Overland* case⁶⁴ the court issued a writ of prohibition, holding unlawful an order of the commission for the payment of compensation, and in the case of *State ex rel. Marble Cliff v. Commission*,⁶⁵ the court issued the writ holding unlawful an additional award of compensation for violation of a specific requirement. In the case of *State ex rel. Jones v. Commission*,⁶⁶ the court issued the writ, holding unlawful the order of the commission determining the premium rate to be applied to an employer. In *State ex rel. McHugh v. Commission*,⁶⁷ the court refused to issue the writ in a premium rate case. In the cases of *State ex rel. Hobart Co. v. Commission*,⁶⁸ and *State ex rel. Cleveland Stove Company v. Commission*,⁶⁹ the commission refused to issue the writ restraining the payment of compensation. Also in the case of *State ex rel. Howard Co. v. Commission*,⁷⁰ the court refused to issue the writ restraining the payment of an additional award of compensation for violation of a specific requirement.

In *Slatmeyer v. Commission*,⁷¹ the court says:

"At all events, no legal questions were committed by the Constitution to the final jurisdiction of the Commission. If the original award as well as the added per centum were both attacked by the employer, there is no doubt that the employer would have the right to prove that the employee was not an employee, and that he was not injured at all, or, if injured, that it was by self-infliction, or that the injury did not arise within the course of his employment; and, if successful in either, the basis of the employee's claim having failed, naturally the added per centum could not be imposed. However, if there was no attack by the employer upon the original award, but the attack was confined solely to the imposition of the added per centum, the constitutional amendment does not deny the right of the employer to question the added award upon jurisdictional, legal, or constitutional grounds. If the added per centum were imposed where no specific requirement was 'enacted by the General Assembly or in form of an order adopted by such board,' manifestly the Commission's finding of failure to comply would be illegal; or if in any manner the jurisdiction of the commission in respect to a specific requirement were attacked, that as well as other legal

⁶⁴ *State ex rel. Willys-Overland Co. v. Commission*, 112 Ohio St. 263, 147 N.E. 33 (1925).

⁶⁵ 154 Ohio St. 459, 96 N.E. 2d 297 (1951).

⁶⁶ 136 Ohio St. 221, 24 N.E. 2d 947 (1940).

⁶⁷ 140 Ohio St. 143, 42 N.E. 2d 774 (1942).

⁶⁸ 150 Ohio St. 14, 80 N.E. 2d 153 (1948).

⁶⁹ 150 Ohio St. 516, 83 N.E. 2d 213 (1948).

⁷⁰ 148 Ohio St. 165, 74 N.E. 2d 201 (1947).

⁷¹ 115 Ohio St. 654, 657, 658, 155 N.E. 484, 485 (1926).

questions would still remain within the jurisdiction of the courts for the purpose of review, and a denial of judicial process in those respects would be a denial of due process."

In a non-complying employer case and in a self-insuring employer

case the employer can refuse to pay the award made by the commission. When such employer is sued to collect the award, the employer can make the defenses referred to in the *Slatmeyer* case. Therefore, in effect such employer has an appeal on questions of fact as well as law from the decision of the Industrial Commission. However, the commission has the power to revoke the right of the self-insuring employer to continue as a self-insurer for failure to pay awards made by the commission. The threat to use this power may cause self-insuring employers to pay such awards by the commission, but in view of the language in the *Slatmeyer* case, it appears that a court would not sustain the exercise of such power for such reason. The Declaratory Judgment Act⁷² may give the employer some relief in such cases.⁷³ In the case of the non-complying employer there is no such threat and such employer makes its defense in court. In such case the burden of proof that the employee is entitled to compensation is on the plaintiff.⁷⁴

With respect to employers who contribute to the State Insurance Fund, the supreme court has said that such employer has no complaint when the commission pays a non-compensable claim from the State Fund. The employer is not aggrieved unless the allowance of the claim affects his merit rating for the determination of premiums payable by the employer. If the employer can show that its merit rating for its premium is affected by the allowance of the claim, it may refuse to pay the additional premium and make its defense upon

As a practical matter in such cases however, the commission does not sue the employer for the premium. Instead, the commission cancels the employer's coverage under the Workman's Compensation Law for nonpayment of premium. The employer cannot take the chance of being without coverage, and as a result the employer pays the premium, even though he believes the premium illegal. The statute appears to forbid the issuance of an injunction against the commission in such cases. Again, however, it seems that the employer could obtain some relief under the Declaratory Judgment Act.⁷⁵

⁷² OHIO GEN. CODE § 12102-1 *et seq.*

⁷³ *American Life and Accident Insurance Co. v. Jones*, 152 Ohio St. 287, 89 N.E. 2d 301 (1949).

⁷⁴ *State v. Hoff*, 140 Ohio St. 236, 42 N.E. 2d 990 (1942). *State v. Russo*, 155 Ohio St. 341, 98 N.E. 2d 830 (1951).

⁷⁵ *State ex rel. Hobart v. Commission*, *supra*, note 68; *State ex rel. Cleveland Stove Co. v. Commission*, *supra*, note 69.

a suit to recover the same.⁷⁵

⁷⁶ *American Life and Accident Insurance Co. v. Jones*, *supra*, note 73.